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No. 06-6407

IN THE
SUPREME COURT OF THE UNITED STATES

SCOTT LOUIS PANETTI,
Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Respondent.

On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the lower court properly held that Panetti was competent to be executed after finding that Panetti knew that he was to be executed and factually aware of the reasons for his execution.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a federal habeas corpus proceeding in which Petitioner Scott Louis Panetti[1] unsuccessfully challenged the state court's determination that he was competent to be executed. In the court below, Panetti appealed the district court's determination that *Ford v. Wainwright*, 477 U.S. 399 (1986) did not preclude his execution. The court of appeals did not err in affirming the district court's judgment, however, and Panetti is not entitled to certiorari review.

STATEMENT OF THE CASE

I. Facts of the Crime

The Fifth Circuit summarized the facts of the offense in its opinion denying relief on Panetti's first habeas petition:

> About one month before the double murder for which he was convicted and sentenced to the death penalty, Panetti and his wife, Sonja separated due to Panetti's drinking and generally abusive behavior. Sonja took their three-year-old daughter and went to stay with her parents, Amanda and Joe Alvarado, a short distance away. The Alvarados told Panetti to stay away from their home and called the police at least once during Panetti's occasional visits there. Sonja obtained a protective order on September 2, 1992 which was ineffective in keeping Panetti away.
>
> On September 7, Panetti asked his friend, David Morquecho, to take his dog because he was going somewhere. They discussed the protective order Sonja had obtained and Morquecho told Panetti he had better stay away from Sonja and leave town for awhile. Panetti later got drunk and awaked early on the morning of September 8, 1992. He shaved his head and sawed off a shotgun. He donned camouflage "jungle" gear and "web gear" including a belt with knives. He took the shotgun and a 30.06 rifle with him and drove to the Alvarado's home.

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[1] Respondent Nathaniel Quarterman will be referred to as "the Director."

Panetti broke the glass in a sliding door near Sonja's bed with the shotgun, breaking the gun as well in the effort. He chased Sonja out of the house and confronted her in the front yard. He disappeared momentarily, allowing Amanda Alvarado to shepherd Sonja back inside and to lock the front door. Panetti then came after Sonja, her mother, and her father, Joe, who was then also present. Panetti cornered Mr. and Mrs. Alvarado in the kitchen with Sonja in the adjoining hallway. He asked Sonja who she wanted to see die first - her or her parents. He then yelled at Mr. Alvarado that he had told Panetti not to come around anymore, and at close quarters, shot him in the chest with the 30.06 rifle, killing him. Sonja realized that their three year-old daughter had entered the hallway. Despite Sonja's begging Panetti not to kill her mother, Panetti repeated to Mrs. Alvarado what he had said to Mr. Alvarado, pressed the rifle against her chest, and shot her. Sonja and her daughter were sprayed with Mrs. Alvarado's blood.

Sonja begged Panetti not to shoot her or take her daughter and Panetti responded that his rifle was jammed. He took the two of them back to the bunkhouse where he had been living, had them wash the blood off of themselves, and gave them fresh clothes. When Sonja asked to be allowed to go check on her parents, Panetti responded, "I just shot your parents. No more mommy, no more daddy; get that through your head." He told her that she and her parents had betrayed him and forced her to read aloud the language of the protective order, repeating herself each time she skipped a part. He reloaded the 30.06 rifle.

He made Sonja lie on the bed with her daughter while he talked to her about "what I've done to you," generally about what people would think of him, and that he had only wanted to provide for Sonja and her daughter. At her request, he then let her go and suggested he might shoot it out with the police until he was killed. He was later apprehended.

Panetti v. Cockrell, No. 01-50347, slip op. at 2-4 (5th Cir. 2003).

II. Prior Appeals and Habeas Proceedings

Panetti was convicted and sentenced to die for the 1992 murders of his in-laws,

Amanda and Joe Alvarado. 1 Tr 8; 7 Tr 1040-1044.[2] The Texas Court of Criminal Appeals affirmed Panetti's conviction and sentence and the United States Supreme Court denied certiorari review. *Panetti v. State*, No. 72,230 (Tex. Crim. App. Dec. 3, 1997), *cert. denied*, 525 U.S. 848(Oct. 5, 1998). Panetti's state application for writ of habeas corpus was later denied by the Court of Criminal Appeals based upon the trial court's findings of fact and conclusions of law. *Ex parte Panetti*, No. 37,145-01 (Tex. Crim. App. May 20, 1998).

Panetti then filed a petition for federal habeas relief, which was denied by the district court on March 9, 2001. *Panetti v. Johnson*, No. 99-CV-260 (W.D. Tex. 2001). In a separate order the district court granted a certificate of appealability ("COA") on six of Panetti's claims. The Court denied Panetti's request for a COA on the remaining seven claims, *Panetti v. Cockrell*, No. 01-50347 (5th Cir. Jun. 11, 2002), and affirmed the district court's denial of federal habeas relief, *Panetti v. Cockrell*, No. 01-50347 (5th Cir. June 19, 2003). Panetti's subsequent petition for writ of certiorari was denied by the Supreme Court on December 1, 2003. *Panetti v. Dretke*, 540 U.S. 1052 (2004).

III. Competency Proceedings

After Panetti's execution was scheduled for February 5, 2004, Panetti filed a motion with the trial court to determine his competency to be executed under Article 46.05 of the Texas Code of Criminal Procedure. The trial court denied that motion without holding a hearing, finding that Panetti failed to make a substantial showing of incompetence.

On January 26, 2004, Panetti filed a motion for stay of execution and a federal habeas petition in the district court below, alleging that *Ford v. Wainwright*, 477 U.S. 399 (1986), prohibited his execution. The court initially denied Panetti's request for a stay, but ultimately

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[2] "Tr" refers to the transcript of pleadings and documents filed with the court during trial, preceded by volume number and followed by page numbers.

granted the motion to allow Panetti the opportunity to present these new allegations to the state court after Panetti submitted new factual allegations relevant to his present mental condition. *Panetti v. Dretke*, No. 04-CA-042 (W.D. Tex. 2004).

Upon his return to state court, two experts, Dr. George Parker and Dr. Mary Anderson, were appointed to evaluate Panetti and determine whether he was competent under article 46.05. Drs. Parker and Anderson filed a joint report with the court concluding that, based on their evaluation, Panetti was competent to executed. On May 26, 2004, based upon this report and without holding a live hearing, the state court again concluded that Panetti failed to show that he was incompetent to be executed.

When Panetti's federal proceedings resumed, the district court denied the Director's motion to dismiss Panetti's petition as successive under 28 U.S.C. § 2244, granted Panetti's motions for appointment of counsel, discovery, and funds for expert and investigative assistance, and set an evidentiary hearing for September 7-8, 2004. Following the hearing, the court issued an opinion denying relief on Panetti's *Ford* claim, finding that he was competent to be executed. The court then granted a COA to determine whether the court correctly determined that the standard for competency in this circuit required "the petitioner know no more than the fact of his impending execution and the factual predicate for the execution." Panetti filed timely notice of appeal. Appendix at 25-27. The Fifth Circuit affirmed the district court's decision on May 9, 2006 *Panetti v. Dretke*, 448 F.3d 815 (5th Cir. 2006). The instant petition followed.

IV. Fact Relating to Competency

The district court summarized the facts introduced below at the evidentiary hearing relating to Panetti's competency to be executed:

> Counsel for [Panetti] presented the testimony of four expert witnesses:

Dr. Mary Alice Conroy, a clinical and forensic psychologist; Dr. Susan Rosin, a clinical psychologist; Dr. Seth Silverman, a psychiatrist; and...Dr. Cunningham. The State presented two expert witnesses, Dr. Parker and Dr. Anderson, appointed to evaluate Panetti by the state habeas court, and three fact witnesses, Major Steve Miller, Lieutenant Terri Hill, and Victoria Williams, TDCJ corrections officers who have had the opportunity to observe Panetti at his place of incarceration, to varying degrees in recent months and years. All of the expert witnesses based their testimony on their respective meetings with Panetti, interviews with people that know him, and Panetti's medical and custodial records.

The expert witnesses, on both sides, seemed to agree Panetti suffers from some form of mental illness. They disagreed, however, about the extent (and diagnosis) of his illness as well as the extent his illness interferes with his ability to understand the reason for his impending execution. Certain facts may be regarded as established, however. First, the testimony of the witnesses in sum, supports a finding that Mr. Panetti suffers from some form of mental illness, which some have diagnosed as a schizoaffective disorder. His illness is significantly characterized, first, by tangentiality and loose association, which means his cognitive processes are impaired in such a way that, when he speaks, he often jumps from topic to topic for no apparent reason, and second, by grandiosity and a delusional belief system in which he believes himself to be persecuted for his religious activities and beliefs. Although Dr. Parker and Dr. Anderson concluded that some portion of Panetti's behavior could be attributed to malingering, their testimony merely causes doubt as to the extent of Panetti's mental illness and symptoms, as they too concluded that his illness was at least, to some degree, genuine.

Each of the expert witnesses weighed in on his or her view of Panetti's understanding of the fact he is to be executed and the reason for it. All agreed Panetti understands he is going to be executed and, at least implicitly, they agreed he is capable of understanding that fact. Despite their converging points of views on this basic point, their opinions diverged on a number of other points.

There was disagreement among Panetti's own witnesses about whether Panetti has an understanding of the murders he committed. Dr. Conroy stated Panetti would say almost nothing about the subject, and what he did say came across as rather garbled. Nonetheless, she was able to testify, "he seemed to be saying that God had nullified it, God had forgiven him, God had wiped the

slate clean - in fact he uses the phrase wiped the slate clean - and it would be sinful to talk about that because its no longer an issue." Dr. Rosin testified somewhat more clearly Panetti knows he killed his wife's parents, basing her conclusion on details of the murders that he went over with her during their meeting. Dr. Silverman testified, on the other hand, that Panetti told him he believed another individual named Sarge committed the murders of his in-laws, and Panetti took no responsibility for them. Dr. Silverman also indicated he did not find it unusual for three different people asking the same questions to get three different answers from someone with Panetti's condition.

The witnesses further disagreed about whether Panetti understands the reason he is being executed. Significantly, no witness was able to state as a matter of fact that Panetti understands he is being executed for the murders he committed. Dr. Parker and Dr. Anderson both testified Panetti has the capacity to understand this fact but were unable to reach a formal conclusion that he did, in fact, understand it. Their inability to reach this formal conclusion apparently can be largely attributed to the fact that Panetti did not tell them he understood he was to be executed for committing the murders during their interview with him. Dr. Parker and Dr. Anderson based their view that Panetti is capable of understanding the reason for his execution on their determinations about his cognitive functionality generally. For example, Dr. Parker testified that in letters Panetti writes to friends and family, he often communicates lucid, socially appropriate thoughts. Dr. Anderson testified that although many of Panetti's responses to her questions in their meeting were abstract and indirect, she regarded them as logical. She further stated Panetti's "capacity to understand the Bible, to understand history, movies, other things that he referenced, tell me he has the capacity to understand the facts of why he's being executed." The observations of Major Miller, Lieutenant Hill, and Ms. Williams corroborate Dr. Parker's and Dr. Anderson's view that at least some of the time, Panetti is capable of communicating, and apparently understanding, in a coherent fashion.

The witnesses for Panetti did not dispute that he has the cognitive functionality to communicate coherently much of the time. Their testimony about his condition was that, despite the fact that he can think and communicate coherently about certain subjects and in certain environments, he suffers from delusions about the world around him. Significantly, they testified he suffers from the delusion that the real reason for his execution is his preaching the Gospel. Dr. Conroy testified Panetti believes his execution is part of a "spiritual warfare" which had been going on since the 1980s.

> Dr. Conroy and Dr. Rosin both testified, despite his delusions, Panetti understands the State's stated reason for seeking his execution is for his murders. They based this testimony on what Panetti told them in their meetings with him. Ultimately both concluded, however, that Panetti does not appreciate the connection between his crimes and his execution. They apparently reached this conclusion from the premise that, as a result of his delusions of persecution, he disbelieves the State's stated reason for executing him. Dr. Silverman testified that in his view, Panetti does not associate his execution with the murders he committed in any way. This view was informed, however, at least in part, by the fact that Panetti did not specifically tell Dr. Silverman he understands the State's stated reasons for seeking his execution.
>
> Dr. Cunningham testified, although Panetti understands that the State of Texas is going to execute him, his delusions prevent him from recognizing the State as "a lawfully constituted authority." Rather, according to Dr. Cunningham, Panetti sees the State "as being in league with the forces of evil to prevent him from preaching the Gospel."

Panetti v. Dretke, No. 04-CA-042 at 14-18 (W.D. Tex. Sept. 29, 2004).

ARGUMENT

I. The Question Presented for Review Is Unworthy of the Court's Attention.

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." SUP. CT. R. 10 (West 2005). Panetti advances no compelling reason in this case, and none exists. Moreover, this proceeding is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which provides in relevant part that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as

> determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding initiated by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254 (West 2005).

This Court has explained that a state court decision is "contrary" to established federal law if the state court "applies a rule that contradicts the governing law set forth in [the Court's] cases," or confronts facts that are "materially indistinguishable" from a relevant Supreme Court precedent, yet reaches an opposite result. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Alternatively, a state court "unreasonably applies" clearly established federal law if it correctly identifies the governing precedent but unreasonably applies it to the facts of a particular case. *Id.* at 407-09.

A federal habeas court's inquiry into unreasonableness should be objective rather than subjective, and a court should not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. *Williams*, 529 U.S. at 409-11. Rather, federal habeas relief is only merited where the state court decision is both incorrect *and* objectively unreasonable, "[w]hether or not [this Court] would reach the same conclusion." *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002); *Williams*, 529 U.S. at 411. As the Court recently explained:

> [T]he range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications

> of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).

Finally, it is the state court's "ultimate decision" that is to be tested for unreasonableness, "not every jot of its reasoning." *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001); *see also Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (*en banc*) (holding that a federal court's "focus on the 'unreasonable application' test under section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence").

The Director argued on appeal below that the district court erred in failing to apply the deferential standard of reviewing required by the AEDPA. *See* Appendix A at 3. The Fifth Circuit found that because it affirmed to ultimate judgment of the district court finding Panetti competent to be executed, it need not decide whether this was error. *Id.* The director continues to assert that the factual findings by the state court that Panetti was competent to be executed, is entitled to deference on federal habeas review regardless of whether a hearing was held.

II. The Court of Appeals Correctly Determined that Panetti Was Competent to be Executed.

Certiorari review is not warranted in this case because the Fifth Circuit's decision is entirely consistent with Eighth Amendment principles as set out in *Ford*. Panetti's argument that the lower court erred in failing to properly apply the standard articulated Justice Powell

in his *Ford* concurrence is not persuasive. Contrary to Panetti's assertion, however, the court of appeals correctly applied Powell's standard in determining that the Eighth Amendment did not bar Panetti's execution. Accordingly, Panetti's complaint here has no merit.

In *Ford*, this Court held the Eighth Amendment prohibition against cruel and unusual punishment precludes the execution of the insane. The Court reasoned that,

> [f]aced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.

Ford, 477 U.S. 409-10. This plurality opinion did not, however, announce a standard by which to assess an individual's competency to be executed. *See Ford*, 477 U.S. at 418 (Powell, J., concurring). Justice Powell took up this task in his concurrence. Citing the Florida statute which required the Governor to stay executions of those individual "who do not have the mental capacity to understand the nature of the death penalty and why it was imposed on them," Powell explained,

> Such a standard appropriately defines the kind of mental deficiency that should trigger the Eighth Amendment prohibition. If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold that the Eighth Amendment forbids the execution of only those who are unaware of the punishment they are about to suffer and why they are about to suffer it.

Ford, 477 U.S. at 421-22.

The federal district court in this case found that Panetti was competent to be executed because evidence demonstrated that he knew 1) he committed two murders; 2) he will be

executed; and 3) the reason the State has given for that execution is his commission of those murders. Appendix A at 4. The issue on appeal to the Fifth Circuit was whether Panetti's understanding of the State's reasons for his execution was sufficient to meet the requirement that he understand the reasons for his execution. *Id.* After a lengthy discussion of circuit precedent which adopted and applied Justice Powell's *Ford* standard, the Fifth Circuit concluded that the district court's findings were sufficient to establish that Panetti is competent to be executed "[b]ecause we hold that 'awareness,' as that term is used in *Ford*, is not necessarily synonymous with 'rational understanding,' as argued by Panetti." Appendix A at 9.

Panetti contends that the lower court erred in its application of Justice Powell's standard. He argues that Fifth Circuit jettisoned Powell's retributive rationale by requiring only a factual awareness to satisfy the Eighth Amendment protection. Panetti insists that the moral force of retribution is lost in an inmate believe that his execution is being carried out because of a conspiracy of demonic forces rather than as lawful punishment for a horrific crime. He further maintains that society does not get the full benefit of retribution if an individual is executed under these circumstances. Petition at 31.

Initially, this argument fails because the retributive goal was satisfied in this instance. Justice Powell stated in his opinion that the retributive goal of the criminal law is satisfied where the defendant perceives the connection between his crime and his punishment. *Ford*, 477 U.S. at 422. The evidence produced during the evidentiary hearing in district court demonstrates that Panetti was able to perceive the connection between his crime and his punishment.

One of Panetti's experts, Dr. Rosin, testified that Panetti knew he had killed his wife's parents. Another of his experts, Dr. Conroy, testified that Panetti "seemed to be saying that

God had nullified it, God had forgiven him, God had wiped the slate clean - in fact he uses the phrase wiped the slate clean - and it would be sinful to talk about that because its no longer an issue." *Id.* at 10. Dr. Conroy and Dr. Rosin further testified that, despite his delusions, Panetti understands that the State's stated reason for seeking his execution is the murders of his in-laws. *Id.* at 11.

Based on this evidence, it is clear that Panetti is able to "perceive the connection" between his crime and his punishment. Panetti's delusional belief that there is a deeper hidden, meaning behind his execution - the State's attempt to prevent him from preaching the gospel - does not change the fact that Panetti nonetheless understands that the State is executing him because he killed his wife's parents. As such, any retributive goal requirement that might exist under Powell's *Ford* standard was satisfied in Panetti's case.

Panetti's "rational understanding" requirement reads too much into Justice Powell's opinion. Prior to *Ford*, decisions by this Court required a factual *and* rational understanding of the nature of the pending proceedings before a defendant could be deemed competent to stand trial. *Drope v. Missouri*, 420 U.S. 162, 171 (1975); *Dusky v. United States*, 362 U.S. 402 (1960). Powell even discussed the *Drope* standard in rejecting the notion that competency to be executed required a finding that a defendant be able to assist in his own defense. He reasoned that such a requirement would "give too little weight to the State's interest in finality." *Ford*, 477 U.S. at 421 n. 422. Thus, a clear distinction exists between the level of competency required to stand trial and that required to be executed.

Moreover, none of the five federal circuit courts that have addressed the issue of competency to be executed under *Ford* appear to have imposed a "rational understanding" requirement. *See Scott v. Mitchell*, 250 F.3d 1101, 1014 (6th Cir. 2001) (concluding that an individual who does not understand the nature of the death penalty and why it was imposed

upon him is incompetent to be executed); *Massie v. Woodford*, 244 F.3d 1192, 1195 n. 1 (9th Cir. 2001) (citing *Ford* for the proposition that "the Eighth Amendment forbids the execution of only those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Fearance v. Scott*, 56 F.3d 633, 640 (5th Cir. 1995) (recognizing that the *Ford* standard requires only that an individual "know the fact of his impending execution and the reason for it"); *Rector v. Clark*, 923 F.2d 570, 570 (8th Cir. 1991) (stating that *Ford* requires the examination of two factors 1) whether the individual understands that he is to be executed; and 2) whether the individual understands why he is being punishment). *Walton v. Johnson*, 440 F.3d 160, 170-71 (4th Cir. 2006) (holding that the test for competency is Justice Powell's *Ford* standard which prohibits the execution only where the individual in unaware of the punishment and why they are about to suffer it).

Indeed, three of the five circuit courts have specifically refused to expand or read further into the standard set out by Justice Powell. *See Bernard v. Collins*, 13 F.3d 871, 877 (5th Cir. 1994) (finding that petitioner was competent despite the fact that his perception of the reason for his conviction and pending execution were at times distorted by a delusion belief that everything negative that happens to him was the result of a conspiracy of Asians, Jews, Blacks, and homosexuals, because "Barnard knew that he was going to be executed and why he was going to be executed – precisely the finding required by the *Ford* competency standard"); *Coe v. Bell*, 209 F.3d 815, 826 (6th Cir. 2000) (rejecting the notion that an individual's ability to assist in his own defense was a requirement for determining competency to be executed); *Walton*, 440 F.3d at 170-173 (refusing to expand the competency standard to include a requirement that the individual be able to prepare for his own passing).

As explained in *Bell* and by Justice Powell in *Ford*, competency to be executed

involves different interests than competency to stand trial. Thus, the requirements for the former are not as rigid as those for the latter. For the reasons stated above the circuit court correctly determined that the Eighth Amendment did not prohibit Panetti's execution.

CONCLUSION

For the foregoing reasons, the State respectfully requests that Holiday's petition for writ of certiorari be denied.

Respectfully submitted,

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